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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY,
JERSEY CENTRAL POWER & LIGHT COMPANY,
and PENNSYLVANIA ELECTRIC COMPANY, *Petitioners*,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*, *Respondents*.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA, *Petitioners*,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*, *Respondents*.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS METROPOLITAN EDISON COMPANY, ET AL.

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QUESTION PRESENTED

Whether the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., requires the Nuclear Regulatory Commission to consider and evaluate effects on the psychological health of area residents resulting from their fears concerning the operation of a nuclear power plant, even if the Commission determines that the actual risk of such operation will not be significant.

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BRIEF FOR PETITIONERS METROPOLITAN EDISON COMPANY, ET AL.

Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company

("Public Utilities"), petitioners in No. 81-2399, submit this brief on the merits in these consolidated cases.[1]

OPINIONS BELOW

The opinions and Amended Judgment of the court of appeals are reported at 678 F.2d 222 (D.C. Cir. 1982). They are reproduced in the appendix to the petition for a writ of certiorari in No. 81-2399 ("Pet. App.") at 1a.

JURISDICTION

The Amended Judgment of the court of appeals was rendered without opinions on April 2, 1982, Judge Wilkey dissenting (Pet. App. 103a).[2] A slightly modified version of the Amended Judgment was issued by the court of appeals with its opinions on May 14, 1982. 678 F.2d at 235-36 (Pet. App. 29a-30a). The Public Utilities filed their petition for a writ of certiorari on July 1, 1982 in No. 81-2399. The government was granted extensions of time to file its petition for a writ of certiorari until August 30, 1982, and its petition was filed on that day in No. 82-358. Both petitions were granted on November 1, 1982. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA"). Sections 2, 101

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[1] In compliance with Supreme Court Rule 28.1, the parent and affiliate corporations of the Public Utilities were listed on page i of their petition for a writ of certiorari.

[2] The April 2 Amended Judgment substantially altered and replaced an initial Judgment issued without opinions by the court of appeals on January 7, 1982 (Pet. App. 105a).

and 102 of NEPA, 42 U.S.C. §§ 4321, 4331, 4332, are reproduced at Pet. App. 109a-113a.

STATEMENT OF THE CASE

A. The Accident At TMI-2

The Public Utilities are the owners of a two-unit nuclear power plant near Middletown, Pennsylvania, known as Three Mile Island Nuclear Station, Units 1 and 2 ("TMI-1" and "TMI-2"). The Nuclear Regulatory Commission ("NRC") issued an operating license for TMI-1 in 1974, and it went into operation shortly thereafter. An operating license for TMI-2 was issued in 1978, and it began operating that year. At the time each unit was licensed, the NRC conducted an extensive safety review and complied with NEPA by preparing an extensive environmental impact statement ("EIS") describing in detail the environmental impacts of plant operation.[3]

On March 28, 1979, a serious accident occurred at TMI-2. TMI-1 was shut down for normal refueling and maintenance at the time, and it was not involved in the accident. The President's Commission appointed to investigate the accident found that although there was considerable damage to the TMI-2 plant, the radiation released during the accident was so low that the actual effect on the physical health of the public will be negligible.[4] Specifically, the maximum estimated off-site radiation dose received by

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[3] The EIS for operation of TMI-1 was issued in December, 1972; the EIS for operation of TMI-2 was issued in December, 1976. *See* Joint Appendix ("J.A.") at 50.

[4] *Report of the President's Commission on the Accident at Three Mile Island—The Need for Change: The Legacy of TMI* at 12 (Oct. 1979) (J.A. 88) (hereinafter "*Report of the President's Commission*").

any one individual was less than annual natural background radiation in the area, and the average dose to a person living within five miles of the plant was no more than 10% of annual background radiation. *Report of the President's Commission* at 34 (J.A. 100); *see also* J.A. 76-77.

The President's Commission also concluded that the most serious health effect of the accident was severe mental stress, which was "short-lived." *Id.* at 13 (J.A. 90). The stress resulted primarily from well-publicized concerns about the possibility of a hydrogen bubble explosion within the reactor vessel, and from an evacuation advisory prompted by an assessment of off-site radiation doses. *Id.* Yet it is now agreed that the concern about a hydrogen explosion was "a groundless fear" caused by an unfortunate "scientific error" by the NRC. *Id.* at 18, 126 (J.A. 98, 103). And the NRC radiation dose assessment leading to the evacuation advisory was simply a misunderstanding of the actual data. *Id.* at 18, 118 (J.A. 98, 101-02). Thus it is fair to say that there was no actual danger to the public and that the mental stress was caused primarily by confusion and misinformation.

B. The TMI-1 Restart Proceeding

On July 2, 1979, the NRC took the extraordinary step of issuing an immediately effective order—without prior notice or hearing—requiring that TMI-1 (the undamaged unit) remain shut down until after a public adjudicatory hearing to determine whether there was reasonable assurance that the Public Utilities could restart and operate the unit without endangering the health and safety of the public. 44 Fed. Reg. 40,451 (July 10, 1979) (J.A. 8). On August 9, 1979, the NRC issued a further order specifying the procedural format for the restart hearing and the

safety issues to be considered, including plant design and procedures, emergency planning, management capability and technical resources, and operator training. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 N.R.C. 141 (1979) (J.A. 9-25). An Atomic Safety and Licensing Board comprised of three administrative judges was established to conduct the proceeding and to make a recommendation on restart of TMI-1; the final decision on whether to allow restart was reserved to the Commission itself. 10 N.R.C. at 146-47, 149 (J.A. 17, 21).

On the issue of psychological distress, the August 9 order provided as follows:

> While real and substantial concern attaches to issues such as psychological distress and others arising from the continuing impact of aspects of the Three Mile Island accident unrelated directly to exposure to radiation on the part of citizens living near the plant, the Commission has not determined whether such issues can legally be relevant to this proceeding. Any party wishing to raise such subjects as contentions, or as aspects of separate contentions, should brief the Atomic Energy Act and National Environmental Policy Act issues he believes appropriate to the Board as part of the contention acceptance process set out in the Commission's regulations. The Board should then certify such issues to the Commission for final decision prior to the issuance of its prehearing conference order pursuant to 10 CFR 2.752(c), either with or without its recommendation on such issues, as it deems appropriate under the circumstances.

Id. at 148 (J.A. 20). Following issuance of this order, Respondent People Against Nuclear Energy ("PANE") sought to intervene in the restart proceeding and proposed to litigate two contentions relating to psychological

distress.[5] Contention No. 1 alleged in substance that as a result of the TMI-2 accident, PANE's members had suffered post-traumatic psychological distress manifested both in "feelings of increased anxiety, tension and fear, a sense of helplessness" and in physical symptoms such as skin rashes, aggravated ulcers, and skeletal and muscular problems. PANE further alleged that renewed operation of TMI-1 would remind its members of the "terror" they felt during the accident and of "the possibility that it will happen again." According to PANE, the "ever present spectre of disaster" at TMI-1 will cause psychological distress, making it "impossible" to operate the plant without endangering the public health and safety. PANE's Contention No. 2 alleged that the accident has undermined citizen confidence in community institutions and has made it difficult to attract desirable businesses and residents to the TMI area. According to PANE's allegations, if TMI-1 is restarted the potential for another accident will exacerbate these alleged problems, "will further stress the community infrastructure, causing increased loss of confidence and a breakdown of the social and political order," and will cause severe harm to "the stability, cohesiveness and well being of the communities" surrounding TMI-1.

In accordance with the Commission's instructions, the parties submitted to the Licensing Board extensive briefs on the issue of whether PANE's contentions are legally cognizable under NEPA or the Atomic Energy Act, 42 U.S.C. § 2011 et seq. The Licensing Board certified the question to the Commission along with its recommenda-

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[5] PANE's psychological distress contentions are reproduced at Pet. App. 115a-116a.

tions on February 22, 1980. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-80-8, 11 N.R.C. 297 (1980) (J.A. 29-47). The Board concluded that psychological distress "is probably not cognizable under the Atomic Energy Act . . . ." 11 N.R.C. at 299 (J.A. 31). With respect to NEPA, the Board concluded that the statute "permits" the NRC to consider "community fears," and it recommended that such issues be considered "for the purpose of directly reducing the causes of psychological stress . . . ." *Id.* (J.A. 31-32). The Licensing Board did not find that NEPA *requires* consideration of psychological distress, and indeed it expressed doubt that such distress could be factored into a full cost/benefit balancing in an EIS. Although the Board found that PANE had established "a sufficient prehearing basis" for its contentions (J.A. 36 n.8), it nevertheless concluded:

> We cannot identify a source of evidence which would permit the measurement of the psychological stress phenomenon well enough for use in a full-scale cost/benefit balancing in an EIS. Nor do we know whether or not the state of the art can now produce such evidence.

Id. at 305 (J.A. 40-41).

After reviewing the Licensing Board's certification, the Commission itself split 2-2 on the issue of whether PANE's contentions should be admitted in the restart proceeding. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-39, 12 N.R.C. 607 (1980) (Pet. App. 77a-100a). Each of the four Commissioners then in office wrote a separate opinion. Commissioners Bradford and Gilinsky concluded that the Licensing Board should be permitted to admit contentions relating to psychological stress. Chairman Ahearne agreed with the Licensing Board that psychological stress "is

probably not cognizable under the Atomic Energy Act," and that the NRC is "not *required* to consider psychological stress" under NEPA. *Id.* at 609-10 (Pet. App. 80a) (emphasis in original). In rejecting PANE's contentions, Chairman Ahearne agreed with the Board that "the best way to minimize any psychological stress in the communities around TMI-1 is to make the plant safe or not allow it to operate." *Id.* at 609 (Pet. App. 79a).

Commissioner Hendrie also concluded that psychological stress was not a proper issue for litigation in the restart proceeding, and he explained his views in a lengthy opinion. He began by pointing out that "the psychological stress at issue is not that associated with actual exposure to radiation—although [PANE's members] may have been so exposed—but the stress caused by the possibility that they and others might be so exposed by future operation. There is no way to allay that fear except not to build or operate the reactor." *Id.* at 612 (Pet. App. 82a). Commissioner Hendrie believed that it would be contrary to the NRC's statutory mandate "to deny permission to operate the reactor regardless of our judgment that the plant is safe from a technical standpoint." *Id.* In his view, NRC decisions should be based upon the actual impact of the plant, not on public perceptions of the impact:

> Intervenors' argument is essentially that even if we are satisfied that the environmental impact is minimal, we must nevertheless hear evidence on and consider in our decision, their fears that we are wrong and the mental stress thus engendered. The short answer is that Congress had already decided that the country is to have a nuclear power program even if it makes some people uneasy.

Id. at 618 (Pet. App. 90a-91a).

The procedural effect of the Commission's tie vote was to exclude PANE's contentions and, because PANE had no other contentions, to exclude PANE itself from the restart proceeding.[6] PANE thereupon sought review of the NRC's decision in the court of appeals pursuant to the jurisdiction conferred by 28 U.S.C. § 2342(4) and 42 U.S.C. § 2239(b).

While the psychological distress issue was being considered by the Commission, the TMI-1 restart hearing went forward before the Licensing Board. It was a truly massive proceeding. Nine groups and individuals intervened, and the Commonwealth of Pennsylvania and several other local governmental entities were admitted as special participants under the NRC's regulations. 10 C.F.R. § 2.715(c). More than one hundred separate contentions were proposed for litigation in the proceeding. The evidentiary hearing began on October 15, 1980, and continued until July 9, 1981. The record was later reopened, and further evidentiary hearings were held from November 11, 1981 through December 10, 1981. More than 175 witnesses testified, producing a transcript of more than 26,000 pages. Thousands of pages of prefiled written direct testimony and documentary exhibits were also filed. The hearing covered in excruciating detail virtually every plausible safety concern relating to operation of TMI-1, limited only by the requirement that the

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[6] One of the five seats on the Commission was vacant at the time of the 2-2 vote. After the appointment of a fifth Commissioner, the NRC reconsidered the matter and a majority of the Commissioners voted to adhere to the result previously reached and to continue excluding PANE's contentions from the restart proceeding. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-81-20, 14 N.R.C. 593 (1981) (Pet. App. 101a-102a).

concern bear some reasonable nexus to the TMI-2 accident. PANE chose not to participate in these hearings and indeed it advised the Licensing Board that the point of its contentions was not "the actual safety threat of TMI Unit 1," since PANE's members allegedly would suffer stress from operation of the plant "regardless of whether TMI Unit 1 were absolutely safe . . . ."[7]

During the course of the restart proceeding, the NRC Staff also prepared an Environmental Impact Appraisal ("EIA") (J.A. 48-65) and a supplemental EIA (J.A. 66-86) evaluating the environmental impacts of restarting TMI-1.[8] The Staff reviewed the full EIS that was issued at the time TMI-1 was licensed, and it analyzed the new or changed impacts that might be associated with restart. The Staff's conclusion was that restart of TMI-1 will not result in any significant environmental impacts beyond those already considered in the original EIS.

The Licensing Board has now completed its work and has issued three decisions totalling some 900 pages that together cover all of the issues litigated in the restart proceeding.[9] The Board's recommendation to the Com-

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[7] PANE Reply Brief on Psychological Distress Issues, dated November 7, 1979, at 12 (Joint Appendix in the court of appeals at 225).

[8] In accordance with the Commission's order, the Staff did not include psychological distress in its appraisal.

[9] *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-32, 14 N.R.C. 381 (1981) (management capability and technical resources); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 N.R.C. 1211 (1981) (plant design and procedures, separation of Unit 1 and Unit 2, and emergency planning); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), Partial Initial Decision of July 27, 1982 (operator training and examinations).

mission is that the Public Utilities be permitted to restart TMI-1.

C. The Decision In The Court Of Appeals

In the court of appeals, PANE argued that its contentions were cognizable under NEPA and the Atomic Energy Act and that the NRC was required to admit and allow litigation of the contentions in the TMI-1 restart proceeding. The Public Utilities intervened and argued, along with the NRC, that the Commission's ruling should be affirmed because psychological distress and resultant community well-being are not cognizable under NEPA or the Atomic Energy Act. The case was argued on November 17, 1981, before a panel composed of Circuit Judges Wright and Wilkey and Senior Circuit Judge McGowan.

On January 7, 1982, the court of appeals issued a brief Judgment, without opinions, from which Judge Wilkey dissented. (Pet. App. 105a-107a). The Judgment directed the NRC to prepare an environmental assessment of the effects of restarting TMI-1 on the psychological health of neighboring residents and on the well-being of surrounding communities. The NRC was further ordered to determine on the basis of the environmental assessment whether a full EIS was required under NEPA. The Judgment also directed the NRC to prepare a statement of the reasons for its determination that psychological health is not cognizable under the Atomic Energy Act.[10] Finally, the court of appeals enjoined the NRC from making a decision on the restart of TMI-1 until it had "complied

[10] The NRC prepared such a statement and submitted it to the court of appeals on March 30, 1982. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-6, 15 N.R.C. 407 (1982).

with the requirements of" NEPA as described in that Judgment.

On April 2, 1982, the court of appeals issued an Amended Judgment superseding the January 7 Judgment, again with no opinions.[11] (Pet. App. 103a-104a). The Amended Judgment ordered the NRC to determine, using its own procedures, whether significant new circumstances or information concerning psychological health impacts of operating TMI-1 have arisen since the preparation of the original EIS at the time TMI-1 was licensed. If so, the NRC was required to prepare a supplemental EIS considering both psychological health effects and the effects on the well-being of surrounding communities. In light of "current operating difficulties at TMI-1,"[12] the Amended Judgment vacated the injunction against making a restart decision, but required the NRC to give PANE and the court of appeals 30 days' notice if it intended to authorize restart "prior to complying with its obligations under NEPA." The Amended Judgment said nothing about the Atomic Energy Act.

On May 14, 1982, the court of appeals finally issued its opinions in the case, along with another Amended Judgment that did not differ significantly from the April 2

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[11] Judge Wright's subsequent majority opinion on NEPA explained that the January 7 Judgment "was replaced on April 2, 1982 and is no longer in effect." 678 F.2d at 226 n.4 (Pet. App. 8a n.4).

[12] The court of appeals was referring to defects found in some of the steam generator tubes at TMI-1—a problem unrelated to the issues in the restart proceeding itself. The Public Utilities' best estimate is that the steam generators will be repaired on a schedule that would allow restart of TMI-1 in March or April of 1983.

Amended Judgment. 678 F.2d 222 (Pet. App. 1a-76a).[13] Judge Wright, joined by Judge McGowan, held that under NEPA an agency is required to evaluate effects on human health and that "health encompasses psychological health." 678 F.2d at 228 (Pet. App. 13a). Judge Wright concluded that although NEPA does not encompass "mere dissatisfactions" arising out of "social opinions, economic concerns, or political disagreements," it does apply to "post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe." *Id.* at 230 (Pet. App. 16a-17a). The court further stated that the NRC's "continued exercise of supervisory responsibility" over operation and maintenance of TMI-1 constitutes major federal action within the meaning of NEPA, thereby imposing upon the Commission a continuing duty to comply with NEPA's requirements. *Id.* at 231 (Pet. App. 19a).[14] Under the court's view of this continuing duty, the NRC is obligated to determine whether "significant new circumstances or information" have arisen with respect to the potential psychological

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[13] Judge Wilkey, joined by Judge McGowan, wrote an opinion affirming the NRC's determination that psychological distress is not cognizable under the Atomic Energy Act. Judge Wright dissented from that holding. None of the parties has sought review of the court of appeals' holding under the Atomic Energy Act.

[14] The Public Utilities believe that the court's statements with respect to the NRC's continuing duties under NEPA are erroneous. As Judge Wilkey pointed out, the majority's conclusion is tantamount to holding that the NRC is engaged in a proposed major federal action "every second of every day," which may "significantly increase the NEPA burden on regulatory agencies in the future." 678 F.2d at 244, 245 (Pet. App. 49a, 50a). We did not specifically present this error for review because a reversal on this ground alone would not necessarily dispose of the case permanently.

health effects of operating TMI-1 since the facility was licensed. *Id.* at 235 (Pet. App. 30a). If the result of this threshold determination is affirmative, then the NRC must prepare a supplemental EIS on psychological health effects. Finally, Judge Wright concluded that PANE's Contention No. 2—dealing with community cohesiveness, stability and well-being—concerns so-called "secondary" socio-economic impacts that need not be considered under NEPA unless a full EIS is otherwise required. The court held that if a supplemental EIS is required to evaluate psychological health effects, the document must also include an analysis of the secondary impacts alleged in PANE's Contention No. 2. *Id.* at 230-31 (Pet. App. 17a-18a).

Judge Wilkey dissented at length from the court's holding under NEPA. He found the majority's reading of NEPA unwise, unwarranted and likely to have a serious adverse impact on the nuclear industry and on all federal agencies subject to NEPA's requirements. PANE's argument, he noted, is not that the actual risks associated with operation of TMI-1 will affect human health, but rather "that individuals' *fears* of an accident at the plant, combined with their lack of confidence in the NRC, will lead to an extension of the psychological stress allegedly caused by the TMI-2 accident." *Id.* at 239 (Pet. App. 37a) (emphasis in original). Thus instead of assessing the actual safety risk of a proposed activity, the agency "is now required to assess *how people perceive and react to the risk*." *Id.* (emphasis in original). In the case of TMI-1, this means that the NRC must "determine whether people so fear renewed operation" that such operation should not go forward, regardless whether the NRC's assessment of "the actual risk indicated that the impact on health will not be significant." *Id.* Judge Wilkey believed that this "takes NEPA far beyond its intended purpose,"

and substitutes the views of area residents—"no matter how scientifically ignorant and divorced from reality those views (fears) may be"—for the judgment that Congress has already made in the case of nuclear power. *Id.* (Pet. App. 37a, 38a). With respect to the congressional judgment on nuclear power, Judge Wilkey quoted this Court's holding that "[n]uclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy . . . ." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978). Thus in Judge Wilkey's view, the effect of the majority's holding "would be to let any special interest group effectively repeal an act of Congress if it could whip up sufficient hysteria." *Id.* (Pet. App. 38a).

Judge Wilkey was also concerned about the practical difficulties of complying with the majority's decision. He pointed out that the issue is not how much psychological damage was caused by the TMI-2 accident, but "how much *additional* damage will result from TMI-1's restart." *Id.* at 240 (Pet. App. 40a) (emphasis in original). This he thought to be "particularly ephemeral and speculative since it is not subject to *measurement* at all." *Id.* (Pet. App. 40a-41a) (emphasis in original). Therefore, the NRC will be forced to "*predict* how every individual in the TMI area will react to the restart." *Id.* (Pet. App. 41a) (emphasis in original). In summary, Judge Wilkey concluded that Congress did not intend NEPA "to encompass an effect which not only varies from individual to individual, but which is also entirely subjective." *Id.* at 241 (Pet. App. 41a).

Judge Wilkey concluded his dissent as follows:

> We have thus come a long way in fifty years, from a time when the President of the United States was

> widely and enthusiastically applauded for declaring: "The only thing we have to fear is fear itself." Now the fear itself necessitates an environmental assessment. All risky activity must grind to a halt in the interim. Inaction has become epidemic, and delay is maximized. I do not believe the Congress intended NEPA to constrain federal action on these psychological and emotional bases.

Id. at 254 (Pet. App. 69a).

SUMMARY OF ARGUMENT

NEPA requires consideration of the actual effects of major federal actions, *not* the public's fears and perceptions of those effects, nor the psychological distress and associated physical symptoms caused by such fears and perceptions. The court of appeals' departure from this basic principle finds no support in the text of NEPA itself or in its legislative history. Congress clearly expected that NEPA would enhance the general well-being of mankind. However, there is no indication that federal agencies were intended to consider and evaluate the psychological and emotional aspects of man's existence directly and independently of the physical environment. Rather, Congress believed that if the quality of the physical environment were improved and maintained, general emotional well-being would flow as an inevitable and salutary by-product. By ordering a direct assessment of public emotions, the court below has confused a legislative goal with the means Congress chose to achieve that goal. Federal agencies are required only to consider the actual physical impacts of a proposed action; beyond that, the courts must accept the congressional judgment that if we take care of our physical surroundings, our general emotional well-being will be the beneficiary.

The decision of the court below is also inconsistent with the vast majority of lower court cases that have considered the question presented here. Those cases have consistently held that while actual impacts, such as an increased crime rate, must be considered under NEPA, public fear of crime in and of itself need not be considered. The court of appeals gave no persuasive reason in law or logic for rejecting the broad judicial consensus reached in other cases.

Finally, the decision below is contrary to all notions of sound public policy because it tends to promote irrational decision making, to distort the NEPA process, and to consume inordinate agency resources without yielding any meaningful public benefits. Judge Wright's reasoning would require the NRC to deny a license for a nuclear power plant found to be safe and environmentally benign if enough people were sufficiently fearful of the plant. Public fears—even those based on misperceptions and erroneous information—could be used to negate the best scientific judgments of the technical agency charged by Congress with the responsibility for regulating nuclear power. If the administrative agency decision-making process is to turn on fears and anxieties rather than the actual effects of a project, then NEPA will have become totally divorced from reality and its scope will be limited only by the imagination. The court of appeals' decision also distorts NEPA's traditional focus upon protection of the physical environment. Under PANE's theory, psychological reactions may tip the NEPA balance away from the alternative that is the least harmful to the actual environment, and it may cause complete abandonment of environmentally benign projects. Recognition of psychological stress as an "environmental effect" can only dilute NEPA's effectiveness in protecting the quality of the physical environment. Implementation of NEPA will also

be diluted by a serious diversion of agency resources. For each federal action, government personnel will now have to predict and evaluate what is essentially unknowable: how individuals will perceive and react emotionally to the project. The court of appeals made no attempt to consider the feasibility, cost and usefulness of the task it was assigning to the NRC and other federal agencies. If such a task is to be assigned at all, it is for Congress to do so, not the court of appeals through a distortion of NEPA.

ARGUMENT

NEPA REQUIRES CONSIDERATION OF ACTUAL ENVIRONMENTAL EFFECTS, NOT PUBLIC FEARS AND PERCEPTIONS OF THOSE EFFECTS

NEPA requires consideration of the actual effects of major federal actions, assessed through the best scientific and technical judgments that can be brought to bear on the subject. It does *not* require consideration of the public's fears and perceptions of those effects, nor the psychological distress and associated physical symptoms engendered by such fears and perceptions. In this case the NRC has analyzed the safety of TMI-1 in the extensive restart hearing, and it has assessed the actual environmental effects of plant operation in the original EIS and in an EIA and a supplemental EIA during the restart proceeding. Nothing more is required. The NRC is not obliged to consider the psychological distress resulting from PANE's fears, however genuine and acute, that the NRC may be wrong in its technical judgments about the actual safety of TMI-1. The court of appeals, however, imposed just such an obligation on the NRC. As shown below, the court's decision is contrary to the text of NEPA, its legislative history, pertinent case law, and considerations of sound public policy. Accordingly, the court of appeals' decision must be reversed.

A. Nothing In NEPA Or Its Legislative History Requires Consideration Of Psychological Distress

One looks in vain for anything in the text of NEPA itself that authorizes the result reached by the court of appeals. Section 2 of the Act, 42 U.S.C. § 4321, generally declares the broad purposes of NEPA, including the promotion of "harmony between man and his environment," prevention of damage to "the environment and biosphere," and enrichment of the "understanding of the ecological systems and natural resources." Section 101, 42 U.S.C. § 4331, provides a somewhat more detailed specification of the nation's environmental policy. It recognizes the "profound impact" of man's activities on "the natural environment" and assigns to the federal government the responsibility to assure, among other things, that all Americans have "safe, healthful, productive, and esthetically and culturally pleasing surroundings" and that the environment can be used "without degradation, risk to health or safety, or other undesirable and unintended consequences." Section 102(c), 42 U.S.C. § 4332(C), is, of course, the crucial "action-forcing" provision of NEPA, requiring federal agencies to include in every proposal for major federal action significantly affecting the quality of the human environment a "detailed statement" describing the "environmental impact of the proposed action."

There is nothing on the face of the statute suggesting that agencies must ascertain and evaluate the psychological state of any person or population group.[15] Certainly

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[15] In other statutes passed before and after NEPA, Congress has expressly said so when it wanted agencies to study psychological effects. *See, e.g.*, 42 U.S.C. § 4913(b)(1) (EPA to investigate "psychological and physiological effects of noise" on humans); 15 U.S.C.

there is nothing to indicate that Congress intended agencies to subordinate their assessment of the *actual* environmental effects of a federal action to the effects feared or perceived by some members of the public. It would surely subvert NEPA's lofty goals to shift the statute's focus away from the country's real environmental problems toward analysis of the public's emotional and psychological reactions to federal action. An agency can hardly assess the actual impact of a project by examining the general public's perceptions, nor can it rationally determine the safety of a nuclear plant on the basis of public fears, even fears so deeply felt that they result in "medically recognized" psychological distress. It is difficult to assume that Congress intended the business of the government to be carried on in such a fashion.

The majority below reached the contrary conclusion simply because, in their view, NEPA was designed to protect human health and "in the context of NEPA, health encompasses psychological health." 678 F.2d at 228 (Pet. App. 13a). The majority pointed to nothing in the text of the statute compelling that result, and the cases they cited all involved proposals, such as herbicide spraying, where the actual impact of the project itself

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§ 278f(a)(2)(E) (Secretary of Commerce to conduct research into "psychological factors affecting human victims of fire" and into "psychological . . . characteristics of persons who engage in arson"); 29 U.S.C. § 669(a)(1) (Secretary of HEW to conduct research into "psychological factors involved" in occupational safety). No comparable expression of congressional intent appears in NEPA. In addition, none of these other statutes contemplates that psychological effects will be studied for the purpose of use in an EIS.

might cause illness or injury.[16] It is one thing to say that an agency must consider the actual health effects of a federal action. It is quite another to say that the agency must consider health effects caused by *fear* of the federal action. As Judge Wilkey made clear, "[i]t is patently obvious that this alleged effect is *entirely different* from those health effects at issue in any NEPA case relied on by the majority." *Id.* at 239 (Pet. App. 37a) (emphasis in original). He correctly saw a vast difference between assessing the actual risk of a proposal and assessing "*how people perceive and react to the risk.*" *Id.* (emphasis in original). The latter approach clearly "takes NEPA far beyond its intended purpose." *Id.*

Nor can the court of appeals' decision be justified by reference to the legislative history of NEPA. There is, to be sure, broad language in the legislative history referring to the social, esthetic, emotional, intellectual and other derivative benefits of a sound environmental policy. However, there is nothing to suggest that these goals are to be independently analyzed and evaluated in an EIS or otherwise. Rather, Congress recognized that if the actual physical environment were improved and protected, the intangible benefits to general human well-being would flow as inevitable and salutary by-products.

For example, during the Senate debates, Senator Jackson introduced into the record a report stating that the

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[16] The cases cited by the majority are *Maryland-National Capital Park & Planning Comm'n v. United States Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973) (floods); *National Organization for Reform of Marijuana Laws v. United States Department of State*, 452 F. Supp. 1226 (D.D.C. 1978) (herbicide spraying); *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908 (D. Ore. 1977) (herbicide spraying). *See* 678 F.2d at 228 & n.8 (Pet. App. 13a).

purpose of NEPA is the maintenance of an environment in which life can be lived "with the fullest possible measures of personal freedom, health, and esthetic satisfaction that can be found." 115 Cong. Rec. S12,131 (daily ed. Oct. 8, 1969). Yet the report goes on to point out:

> No government is able to guarantee that these values can be realized, but government is able to assist greatly in the maintenance of an environment where such values are at least realizable.

Id. Thus, while Congress did not directly legislate an improvement in the intangible aspects of human well-being, it did take steps to protect the physical environment, thereby making man's well-being "at least realizable." Senator Jackson also introduced excerpts from a report by the Committee on Interior and Insular Affairs stating that "[n]atural beauty, increased recreational opportunity, urban esthetics and other amenities would be important *byproducts* of a national environmental policy." 115 Cong. Rec. S7818 (daily ed. July 10, 1969) (emphasis added). Again, these benefits were regarded as indirect "byproducts" of improving the physical environment.[17]

Other portions of the legislative history confirm that Congress understood NEPA to be addressed primarily to the actual physical condition of the environment. In fact, Senator Jackson described NEPA as "the most signifi-

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[17] The same report also referred to the "crowding, congestion, and conditions within our central cities which result in civil unrest and detract from man's social and psychological well-being." 115 Cong. Rec. S7815 (daily ed. July 10, 1969). Here too, the intangible benefits are given as one reason to address the actual physical impacts on the urban environment. *See* 678 F.2d at 239 n.17 (Pet. App. 37a-38a n.17) (Wilkey, J., dissenting).

cant measure in the area of *natural resource* policy ever considered by the Congress," and he described the congressional purpose as follows:

> What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind. That we will not intentionally initiate actions which will do irreparable damage to the *air, land, and water which support life on earth.*

115 Cong. Rec. S7815 (daily ed. July 10, 1969) (emphasis added). Throughout its consideration of NEPA, Congress focused principally upon the perceived degradation of the physical environment such as, for example, the pollution of Lake Erie,[18] the Santa Barbara oil spills,[19] the effects of DDT,[20] deterioration of the Everglades,[21] the

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[18] *See Environmental Quality: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries*, 91st Cong., 1st Sess. 22, 152, 203, 204 (1969) (hereinafter "*House Committee Hearings*"); *National Environmental Policy: Hearings Before the Senate Committee on Interior and Insular Affairs*, 91st Cong., 1st Sess. 159 (1969) (hereinafter "*Senate Committee Hearings*"); 115 Cong. Rec. H8272-73 (daily ed. Sept. 23, 1969).

[19] *See* H.R. Rep. No. 378, 91st Cong., 1st Sess. 5 (1969); S. Rep. No. 296, 91st Cong., 1st Sess. 8 (1969); 115 Cong. Rec. S7816 (daily ed. July 10, 1969).

[20] *See House Committee Hearings* 14, 117, 122, 124, 133, 153, 177, 178, 186, 187, 188, 203, 206, 209; *Senate Committee Hearings* 60, 61, 62, 88, 101, 102, 147; H.R. Rep. No. 378, 91st Cong., 1st Sess. 15 (1969); S. Rep. No. 296, 91st Cong., 1st Sess. 8, 24 (1969).

[21] *See Senate Committee Hearings* 75; S. Rep. No. 296, 91st Cong., 1st Sess. 8 (1969).

growing number of fish kills,[22] and the development of the Alaskan oil fields.[23] While no attempt can be made here to provide an exhaustive list of the topics considered during the congressional hearings and debates, the examples cited above are indicative of the nature of the legislative concern.[24] Apart from broad language expressing the hope that human happiness, satisfaction and general well-being would flow from the new environmental policy, the legislative history centers exclusively on the need to curtail the degradation of the physical environment. Congress certainly did not address the psychological impact alleged here—which arises solely from *fears* of an undesirable physical impact. There is not the slightest indication that Congress intended federal agencies to consider such psychological impacts independently or to evaluate them directly in an EIS. The contrary result reached in the court below, as Judge Wilkey pointed out, clearly "extends the reach of NEPA far beyond its intended scope." 678 F.2d at 238 (Pet. App. 36a).

B. The Courts Have Consistently Rejected Consideration Of Public Fears Under NEPA

The question presented by this case has not been directly addressed in any of this Court's prior decisions. The lower courts, however, have decided the issue, and

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[22] *See House Committee Hearings* 293-94; 115 Cong. Rec. H8280 (daily ed. Sept. 23, 1969).

[23] *See Senate Committee Hearings* 74-75.

[24] After reviewing the legislative history of NEPA, the Sixth Circuit concluded that the statute was "designed to protect and enhance the natural resources of the nation. . . ." *Breckinridge v. Rumsfeld*, 537 F.2d 864, 865 (6th Cir. 1976), *cert. denied*, 426 U.S. 1061 (1977).

with one exception,[25] they have consistently held that NEPA does not encompass public fears of a proposed federal action, as opposed to the actual effects of the project itself.

In *First National Bank of Chicago v. Richardson*, 484 F.2d 1369 (7th Cir. 1973), a proposed jail was attacked under NEPA, and the Seventh Circuit held that public fears and sensibilities are not cognizable under NEPA. The court acknowledged that plaintiffs' concerns were "none the less real because psychological," *id.* at 1375, but it concluded that:

> As regards public "sensibilities" aroused by criminal defendants, we question whether such factors, even if amenable to quantification, are properly cognizable in the absence of clear and convincing evidence that the safety of the neighborhood is in fact jeopardized.

Id. at 1380 n.13. The point of the case is clear. While the actual impact of a project—such as increased crime—may be cognizable under NEPA, public fear of the impact is not.

In *Nucleus of Chicago Homeowners v. Lynn*, 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976), the Seventh Circuit followed the *First National Bank* case

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[25] The exception is *City of New York v. United States Department of Transportation*, 539 F. Supp. 1237, 1273-74 (S.D.N.Y. 1982), which held that under NEPA the Department of Transportation must consider community fears of transporting radioactive material through densely populated areas, regardless how unjustified the fears may be. The case is presently on appeal to the Second Circuit. Nos. 82-6094, 82-6200.

and held that fear of low-income housing is not cognizable under NEPA:

> To the extent that this claim can be construed to mean that HUD must consider the fears of the neighbors of prospective public housing tenants, we seriously question whether such an impact is cognizable under NEPA.

524 F.2d at 231.

The Eighth Circuit has reached the same result. In *Como-Falcon Coalition, Inc. v. United States Department of Labor*, 465 F. Supp. 850 (D. Minn. 1978), plaintiff sought to enjoin the establishment of a Job Corps center in St. Paul, Minnesota. In rejecting plaintiff's assertion that an EIS was required, the district court stated:

> The impact a Job Corps center might have on the security of an urban environment is an emotionally charged issue. Members of plaintiff understandably fear an influx of disadvantaged youth in their neighborhood when reports from other Job Corps centers portend increased criminal activity. . . . The incidence of crime as an environmental impact cannot be determined by a comparison of emotional fervor. *Because plaintiff's fears, while understandable, are not based on a significant likelihood of danger to the community, the Court concludes that the Department of Labor acted reasonably in determining that the proposed Job Corps center would not appreciably affect public safety in the neighborhood.*

465 F. Supp. at 861-62 (emphasis added). On appeal, the Eighth Circuit affirmed, noting particularly that "[t]he social and economic factors raised by the Coalition's complaint are not encompassed within the provisions of NEPA . . . ." *Como-Falcon Community Coalition, Inc. v. United States Department of Labor*, 609 F.2d 342, 345 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980). Here again, the actual danger to the community was found to

be the proper subject of NEPA analysis, not the public's fear in and of itself.[26]

The Second Circuit has reached the same result for the additional reason that psychological reactions cannot be usefully quantified for NEPA purposes. In *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), the court held that psychological reactions to a proposed jail should not be considered under NEPA:

> For the most part [plaintiffs'] opposition is based upon a psychological distaste for having a jail located so close to residential apartments, which is understandable enough. *It is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement.*[10]

471 F.2d at 833 (emphasis added). The court's footnote 10 explained further:

> 10 Unlike factors such as noise, which can be related to decibels and units which measure dura-

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[26] Similarly, a district court has held that community attitudes and fears of low-income housing need not be considered under NEPA independently of the tangible factors upon which they may be based. *Trinity Episcopal School Corp. v. Romney*, 387 F. Supp. 1044, 1078-79 (S.D.N.Y. 1974), *rev'd in part on other grounds*, 523 F.2d 88 (2d Cir. 1975). To the same effect is *Monarch Chemical Works, Inc. v. Exon*, 466 F. Supp. 639, 657 (D. Neb. 1979). In the court below, PANE cited *Chelsea Neighborhood Ass'ns v. United States Postal Service*, 516 F.2d 378 (2d Cir. 1975), as support for its position. Although there is broad language in that opinion, the decision appears to turn on the agency's failure to consider the actual incidence of crime rather than public fear in and of itself. *See* 516 F.2d at 388.

> tion, or crime, in which crime statistics are available, *psychological factors are not readily translatable into concrete measuring rods.*

Id. n.10 (emphasis added). The same rationale applies here. As the Licensing Board itself found, the psychological effects alleged by PANE cannot be meaningfully quantified and weighed in a NEPA cost/benefit analysis.[27]

The foregoing cases reflect a broad judicial consensus that NEPA is and should be concerned with the actual physical impacts of a federal project, not with individuals' fears, perceptions and psychological reactions to the project. The court of appeals departed from this consensus on the ground that the prior cases involved "socioeconomic anxieties" resulting from "people pollution," and not "medically recognized impairment of . . . psychological health" resulting from fears of "the holocaust potential of an errant nuclear reactor." 678 F.2d at 229, 230 (Pet. App. 15a, 16a). The apparent premise of the majority's distinction is that nuclear power is a special case capable of engendering fear and distress that is somehow different for NEPA purposes from fear and distress caused by other factors, such as urban crime or mining disasters. As Judge Wilkey demonstrated, the distinction is "obviously unsupportable" and indeed is "destroyed by the major-

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[27] A different panel of the District of Columbia Circuit has relied on *Hanly* to hold that some questions of esthetics do not lend themselves to NEPA analysis because "[l]ike psychological factors they 'are not readily translatable into concrete measuring rods.'" *Maryland-National Capital Park & Planning Comm'n v. United States Postal Service*, 487 F.2d 1029, 1038 (D.C. Cir. 1973), *quoting Hanly v. Kleindienst*, *supra*, 471 F.2d at 833 n.10. The problems of quantification and measurement are discussed further in the next section of this brief.

ity's own finding that it is a 'simple fact that effects on psychological health are effects on the health of human beings.' " 678 F.2d at 241 (Pet. App. 41a, 42a). Whether the source is urban crime or nuclear power, we are dealing with public fears and anxieties. If NEPA applies in one case, it must in all. *Id.* (Pet. App. 42a).

There is no basis in law or logic for distinguishing the present case from the prior cases holding that psychological distress is not cognizable under NEPA. The court of appeals should not have been so quick to cast aside the accumulated wisdom and experience of the other courts that have considered this issue.

C. Recognition Of Psychological Stress As An Environmental Impact Will Distort The NEPA Process And Promote Irrational Decision Making

Enthusiasts and critics alike have described NEPA as the Magna Carta of the environmental movement.[28] Whether the relevant environment is rural or urban, those charged with satisfying NEPA's mandate have been required to take a "hard look" at the actual environmental impacts of a proposed federal action, *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976), and to weigh those costs against the benefits to be derived from the project. *See* 42 U.S.C. §§ 4331(b)(5), 4332(2)(C). By requiring agencies publicly to take environmental ameni-

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[28] *See* Liroff, *NEPA Litigation in the 1970s: A Deluge or a Dribble?*, 21 Nat. Resources J. 315, 316 (1981); Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?*, 72 Colum. L. Rev. 963 (1972). This Court similarly described NEPA as "one of the recent major federal efforts at reversing the deterioration of the country's environment." *United States v. SCRAP*, 412 U.S. 669, 693 (1973).

ties into account in the course of decision making, in addition to economic and technical considerations, Congress hoped that productive and enjoyable harmony between man and his environment would be maintained for this and future generations. 42 U.S.C. § 4321; *Andrus v. Sierra Club*, 442 U.S. 347, 350-51 (1979).[29]

Necessarily implicit in the lower court's decision to require consideration of public fears of TMI-1 is a determination that this additional analysis will contribute to NEPA's stated goal of creating and maintaining conditions under which man and nature can exist in productive harmony. 42 U.S.C. § 4331(a). But this is clearly not the case. In fact, the introduction of this perceived risk or fear factor into the NEPA balancing process necessarily will distort that process and devalue the environmental assets the Act was created to promote and protect.

Whenever a new factor is added to any balancing process, the relative weight and importance of the other factors is necessarily diminished. Consideration of psychological stress will inevitably dilute the emphasis traditionally placed on the air, land, water and other actual environmental assets that NEPA was indisputably intended to protect. *See* 115 Cong. Rec. S7815 (daily ed. July 10, 1969) (statement by Senator Jackson). In some cases, the traditional emphasis could be so diluted that the ultimate decision would be skewed away from the most environmentally benign alternative. For example, in licensing new plants the NRC customarily implements

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[29] In selecting a course of action, however, an agency need not elevate environmental concerns over other appropriate considerations. *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980).

NEPA by comparing the environmental effects of nuclear power with alternative energy sources. If psychological stress must be considered as an "environmental cost," it might tip the balance toward a coal-fired plant or some other alternative that actually produces a more harmful impact on the natural environment. Thus public fears and anxieties, however unjustified, could be used to transform NEPA into a vehicle for promoting the least environmentally desirable alternative.

By the same token, consideration of psychological stress could tip the balance against proceeding at all with a project the agency found to be environmentally benign. In the present case, for instance, PANE asserts that because of psychological stress TMI-1 can *never* be operated.[30] It hardly serves NEPA's purposes to hinder or block federal actions that are determined to have no actual environmental impacts of any significance.

In addition, consideration of psychological stress will divert agency resources away from assessment and protection of the traditional environmental assets that NEPA was designed to preserve.[31] The diversion of re-

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[30] This is implicit in the last sentence of PANE's Contention No. 1, which states that the distress makes it "impossible" to operate TMI-1. (Pet. App. 115a). *See also* PANE Opposition to Public Utilities' Motion to Expedite Consideration, at 2, filed in the court of appeals on Feb. 23, 1981 (psychological distress should be considered "so that the reactors can be properly decommissioned").

[31] The extent of agency resources that would be diverted from other uses is well illustrated in this case. As of May 13, 1982, the NRC had spent more than $400,000 on its effort, since the court's January 7, 1982 initial Judgment, to assess psychological stress. Yet the NRC still was not in a position to make the threshold determination concerning the "significance" of the alleged psychological distress. *See* Request of Respondent NRC for Expeditious Issuance of the Court's Opinions, filed with the court of appeals on May 13, 1982.

sources is by no means limited to the NRC. Other agencies will be faced with psychological stress contentions in the context of missile sites, toxic chemical facilities, prisons, major highways, public housing projects, and other programs that may be beneficial to the Nation as a whole, but are subject to the "not-in-my-backyard" syndrome. Even if psychological stress can be dismissed as insignificant in some of these instances, the agencies will still have to expend the time, money and effort to determine the significance of the alleged impact. And the resulting litigation is likely to be endless.[22]

In his majority opinion on psychological stress under the Atomic Energy Act, Judge Wilkey focused on the unfortunate shift in resource allocation that might result from requiring the NRC to direct its attention to psychological reactions to nuclear power. He concluded that instead of ensuring the technical safety of operating reactors, as it is presently technically staffed to do, the NRC would be required to develop stress expertise which, inevitably, would result in a reduced ability to attend to the safety issues at hand. 678 F.2d at 252 (Pet. App.

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[22] For example, intervenors around the country began raising psychological stress contentions in NRC licensing cases immediately after the lower court's decision. *See* Public Utilities' petition for certiorari, at 9-10 & n.11; 678 F.2d at 248-49 (Pet. App. 57a-59a). The NRC attempted to stem this flow of cases with a Statement of Policy on psychological stress contentions. 47 Fed. Reg. 31,762 (July 22, 1982). The Statement of Policy is now under attack in the Sixth Circuit. *Sunflower Alliance, Inc. v. NRC*, No. 82-3563 (6th Cir., filed Sept. 13, 1982).

66a).[33] If, as Judge Wright stated eleven years ago, NEPA requires "consideration 'appropriate' to the problem of protecting our threatened environment, not consideration 'appropriate' to the whims, habits or other particular concerns of federal agencies," *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1113 n.8 (D.C. Cir. 1971), surely it also requires that agencies not "downplay environmental factors" in the pursuit of "whims, habits or other particular concerns" of those psychologically affected by what they mistakenly perceive to be the costs or risks associated with proposed government action. *Id.*

In addition to detracting from the appropriate emphasis given by agencies to the physical environment, the transformation of psychological stress into a NEPA environmental impact is tantamount to legally mandated irrational decision making. Insofar as fears and perceptions coincide with reality, the public concern will be satisfied by consideration of the actual impacts. However, if perceptions are wrong or irrational, they can be factored into the NEPA decision-making process only at the risk of producing irrational agency decisions. Congress cannot have intended to sanction irrational decisions by the administrative agencies it created to deal with the Nation's difficult problems. Moreover, as Commissioner Hendrie stated, any such approach assumes that the public is incapable of responding intelligently to factual information and would "mean treating the Amer-

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[33] The majority below apparently overlooked Judge Leventhal's pragmatic observation that courts applying NEPA must realize "that the resources of energy and research—and time—available to meet the Nation's needs are not infinite." *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

ican public with patronizing condescension." (Pet. App. 90a). By catering to irrationality on the part of a portion of the public, resources of the agency would be diverted from "the task of assuring nuclear safety" to "fruitless speculation about means of mollifying irrational fears." *Id.* Ultimately, this interpretation of NEPA would require agencies to override sound technical judgments, congressionally determined to be in the Nation's best interest, because of irrational, albeit genuine, fears and anxieties. Notwithstanding the broad mandate of NEPA, such irrational decision making ought not to be sanctioned as within the Act's bounds. NEPA was not intended to impose on federal agencies this "through-the-looking-glass" approach to administrative decision making.

There are other, very practical reasons for not evaluating the psychological distress engendered by people's perceptions about every major federal action on which government agencies embark. Psychological distress is a totally subjective phenomenon that necessarily varies from individual to individual. Its subjectivity stems not only from its unique and synergistic relationship to all of the events each individual has experienced in his or her lifetime, but also from the manner in which each individual has mentally processed or synthesized those experiences. Perhaps this is what the Second Circuit was referring to in its observation that "psychological factors are not readily translatable into concrete measuring rods." *Hanly v. Kleindienst*, *supra*, 471 F.2d at 833 n.10. Commissioner Hendrie also focused on this problem when he observed that the "problems of quantification and proof would be such as to make rational factfinding extremely difficult, as licensing boards and the Commission struggled to decide between the largely unprovable assertions of opposing sets of expert witnesses." (Pet. App. 89a).

The difficulty in measuring the stress of *proposed* actions is further compounded in this case by the wholly predictive nature of the inquiry.[34] In this case, not only would the NRC have to evaluate the residual psychological stress produced by the TMI-2 accident, but it would have to distinguish that residual stress, which is not at issue here, from the increment of stress caused by the restart of TMI-1. Prediction becomes all the more difficult because the stress need not be grounded on reality. At TMI, for instance, we now know that individuals' fears at the time of the TMI-2 accident were based largely on misinformation about an allegedly explosive hydrogen bubble and supposedly high levels of radiation released from the plant—issues of fact that subsequently were proven false. *Report of the President's Commission* at 13, 18, 126 (J.A. 89-90, 97-98, 102-03).

In addition to attempting to establish a causal link between a proposed action, on the one hand, and psychological effects, on the other, the agency would be required to engage in wholesale speculation about individuals' future sensibilities. For example, if people in the area were experiencing severe financial conditions during the time of the restart, these conditions might greatly influence their reaction to the restart—an eventuality that the agency could not possibly take into account in its analysis. Nevertheless, the agency would be required to guess what level of stress will occur. Such a highly speculative

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[34] Judge Wilkey recognized the problem of predicting stress, noting that while PANE "makes much of the practice of courts in measuring psychological injury," such a retrospective analysis, in which monetary damages are assessed for purposes of liability, is "of dubious value" here. 678 F.2d at 240. (Pet. App. 40a).

exercise in prophecy cannot reasonably be within the bounds of NEPA. *See Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079, 1092-93 (D.C. Cir. 1973); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).[35]

Furthermore, not only would stress have to be measured, but it also would have to be factored into the NEPA cost/benefit analysis. An agency therefore would have to place a value on mental sensibilities. This additional, extraordinarily subjective judgment requires the agency to assign various weights to individuals' multitudinous views about and reactions to embarking, or not embarking, upon a proposed federal action. Presumably, an agency would be required to determine which feelings were significant and which were not, and to decide whether the significance placed on psychological reactions in a NEPA analysis should be based on the strength of the feeling, the perceived justification for it, or some other criterion.[36]

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[35] The Licensing Board also questioned whether the state of the art could produce evidence on prospective stress which would be useful in a NEPA cost/benefit analysis. 11 N.R.C. at 305 (J.A. 40-41). Nevertheless, it thought that NEPA permitted the agency to evaluate stress for the purpose of reducing the causes of stress. *Id.* at 299 (J.A. 31-32). It is difficult to understand how an adjudicatory board could ameliorate fear that is unrelated to any actual safety hazard. As Commissioner Hendrie observed, "[t]here is no way to allay that fear except not to build or operate the reactor." (Pet. App. 82a).

[36] Judge Leventhal addressed the difficulty in making these kinds of judgments in *Maryland-National Capital Park & Planning Comm'n v. United States Postal Service*, *supra*, in the context of certain esthetic effects. In considering whether Congress intended agencies to consider whether, for example, a particular building was beautiful, Judge Leventhal concluded that "as a matter of reasonable

In order to comply with the court of appeals' novel interpretation of NEPA, an agency would have to spend its resources developing and interpreting psychological profiles of a reasonable cross-section of the affected community and, in all likelihood, a control group community. Whether through the use of detailed questionnaires or one-on-one interviews, this complex and time-consuming process would significantly intrude into the personal lives of many people who would not have invited such inquiries.[37] It is doubtful that Congress intended that NEPA be used to accomplish a task that invades individual privacy without any assurance that its surveys could produce meaningful answers.

In summary, as Judge Wilkey observed, the problem with measuring the psychological stress that will be produced by restart of TMI-1 is that "it is not subject to *measurement* at all. Instead, the Commission will be forced to *predict* how every individual in the TMI area will react to the restart." 678 F.2d at 240 (Pet. App. 40a-41a) (emphasis in original). As he stated, Congress

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construction of NEPA," the required "substantial inquiry" or "hard look" does not apply "where the claim of NEPA application is focused on alleged esthetic impact and the matters at hand pertain essentially to issues of individual and potentially diverse tastes." 487 F.2d at 1038-39. Judge Wilkey also touched upon this issue in challenging the majority's distinction between "real," "justifiable" fears and "social," "economic" or "political" fears. 678 F.2d at 242 (Pet. App. 44a).

[37] In its Preliminary Plan for Presentation of Evidence on Psychological Distress, PANE advised the Licensing Board that its evidence would include "thorough psychological evaluation through both standardized testing and intense individual interviews." (J.A. 27).

did not intend NEPA to encompass such a "particularly ephemeral," "speculative" and "entirely subjective" inquiry. *Id.*

In the final analysis, the question at the heart of this case is whether treating psychological stress as a health effect cognizable under NEPA furthers the goals the Act was intended to promote and the values it was designed to protect. There are several reasons why it does not. Whether couched in terms of the speculativeness of such a wholly predictive inquiry,[38] the difficulty in measuring future stress,[39] or the inappropriateness of evaluating stress *per se* in contrast to the underlying environmental causes,[40] the result is the same. The linchpin of all of these analyses is that they place appropriate limits on the scope of NEPA. These limits should not be swept aside to accommodate psychological stress as a "new" environmental impact, consideration of which must be included in government decision making. The lower court disregarded these limits. Instead, because the TMI-2 accident was "the most publicized nuclear accident of our time," and because "the people of the nation as a whole" are for some reason "entitled" to NEPA consideration of this case, the court declared that NEPA was meant to

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[38] *See* 678 F.2d at 240 (Pet. App. 40a). *See also Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

[39] As the Second Circuit cogently stated, "psychological factors are not readily translatable into concrete measuring rods." *Hanly v. Kleindienst*, 471 F.2d 823, 833 n.10 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *see also* 678 F.2d at 240-41 (Pet. App. 40a-41a).

[40] Judge Wilkey found it "hard to believe that Congress intended NEPA to force agencies to consider psychological reactions to risks apart from the actual level of the risks themselves." 678 F.2d at 243 n.40 (Pet. App. 47a n.40).

apply "especially" to decisions "of this importance." *See* 678 F.2d at 253 (Pet. App. 67a) (Wilkey, J., dissenting).

This sort of reasoning is reminiscent of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), in which the Court struck down the lower court's effort to fashion what it believed were the "best" procedures, "most likely to further some vague, undefined public good," in lieu of deferring to the NRC's choice of procedures for satisfying the mandate of NEPA and the requirements of the Administrative Procedure Act. 435 U.S. at 549. In the words of Justice Rehnquist, writing for the Court, the circuit court's "Monday morning quarterbacking" was an "unwarranted" intrusion into the administrative process, and represented "judicial intervention run riot." *Id.* at 547, 548, 557. An important lesson of *Vermont Yankee*, and perhaps the ultimate issue presented by the case,[41] is the proper role of the courts in the political debate over nuclear energy as a source of electricity. The Court's prescription on this subject could not have been plainer:

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are only to play a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action.

Id. at 557-58 (emphasis in original).

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[41] *See* Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 Harv. L. Rev. 1833, 1845 (1978).

As a result of this Court's admonition in *Vermont Yankee*, the court of appeals was stymied in its effort to supplant the NRC's administrative procedures with procedures that produce results more to its own liking. In the present controversy, the court of appeals once again has embarked on a tack which, although seemingly less direct, is aimed even more pointedly than its interventionism in *Vermont Yankee* at utilizing NEPA as a tool to undermine the Nation's nuclear policy, with which the court evidently disagrees. Speaking for the majority, Judge Wright simply could not "believe" that the psychological aftermath of the TMI-2 accident falls outside "the broad scope" of NEPA, because this case, he thinks, presents "the holocaust potential of an errant nuclear reactor." 678 F.2d at 229, 230 (Pet. App. 15a, 17a).[42] But administrative decisions may not be set aside simply because of judicial unhappiness with the result otherwise reached. *See Vermont Yankee, supra*, 435 U.S. at 558.

Whatever the view of the lower court about the "holocaust potential" of nuclear power, it may *not* use the guise of judicial review to question policy issues resolved by the Congress. Yet the clear implication of the decision below is that the NRC could not license a plant otherwise found safe if some local residents have conceived a fear and distrust of nuclear power that is sufficiently severe and intense. As Judge Wilkey pointed out, this would sub-

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[42] As Judge Wilkey stated, "[a]t the heart of the majority view is a belief that nuclear power and its attendant risks must be judged under some special standard." 678 F.2d at 253 (Pet. App. 68a). In his view, this value judgment "represents a blindness toward the larger picture"—the risks inherent in any sort of energy production activity. *Id.*

ordinate the scientific judgment of the NRC to the "*views of the population itself on the very desirability of the activity* . . . ." 678 F.2d at 239 (Pet. App. 37a, 38a) (emphasis in original). Thus NEPA would be transformed into a device through which residents' fear of nuclear power could be used to nullify the congressional determination "to at least try nuclear energy."

Contrary to Judge Wright's assertion, the court's analysis has little to do with "the protections Congress provided in the National Environmental Policy Act." 678 F.2d at 235 (Pet. App. 28a). Rather, its decision is a "novel hurdle, well designed to delay the development of nuclear power (contrary to the national policy determined by Congress and the Executive)," and is "thoroughly consistent" with the lower court's "track record of using NEPA to delay the development of important energy sources." *Id.* at 237-38 (Pet. App. 34a) (Wilkey, J., dissenting).[43]

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[43] Judge Wilkey referred also to the lower court's recent decision in *Natural Resources Defense Council, Inc. v. NRC*, 685 F.2d 459 (D.C. Cir. 1982), *cert. granted*, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (Nos. 82-524, 82-545, 82-551). In Judge Wilkey's view, the combined effect of that case and the present one is that the court of appeals "has effectively taken over control of the nuclear industry." 678 F.2d at 238 (Pet. App. 34a).

CONCLUSION

The Amended Judgment of the court of appeals should be reversed, and the case should be remanded with instructions to deny PANE's Petition For Review.

Respectfully submitted,

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